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ORIGINAL

Supreme Court, U.S.
FILED
FEB 11 2003
OFFICE OF THE CLERK

No. 02-9065

IN THE

SUPREME COURT OF THE UNITED STATES

SHAKUR MUHAMMAD — PETITIONER
(Your Name)

VS.

Mark Close — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

[X] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

1.) U.S. District Court For The Eastern District of Michigan; Northern Division
2.) U.S. Court of Appeals For The Sixth Circuit

[ ] Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

(Signature)

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ORIGINAL

02-9065

Supreme Court, U.S.
FILED
FEB 11 2003
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AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, SHAKUR MUHAMMAD, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ 10 to 12.00	$	$ 10 to 12.00	$
Self-employment	$ 0	$	$ 0	$
Income from real property (such as rental income)	$ 0	$	$ 0	$
Interest and dividends	$ 0	$	$ 0	$
Gifts	$ 0	$	$ 0	$
Alimony	$ 0	$	$ 0	$
Child Support	$ 0	$	$ 0	$
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$	$ 0	$
Disability (such as social security, insurance payments)	$ 0	$	$ 0	$
Unemployment payments	$ 0	$	$ 0	$
Public-assistance (such as welfare)	$ 0	$	$ 0	$
Other (specify):	$ 0	$	$ 0	$
Total monthly income:	$ 10 to 12.00	$	$ 10 to 12.00	$

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
Mich. Dept. of Corrections	1576 Bluewater Hwy	Since 97 Hayloft Store	$ 10 to 12.00
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
NA			$
			$
			$

4. How much cash do you and your spouse have? $ 0
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
NA		$	$
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings. NA

☐ Home
Value _____

☐ Other real estate
Value _____

☐ Motor Vehicle #1
Year, make & model _____
Value _____

☐ Motor Vehicle #2
Year, make & model _____
Value _____

☐ Other assets
Description _____
Value _____

6. State every person, business, or organization owing you or your spouse money, and the amount owed. NA

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
_____	$_____	$_____
_____	$_____	$_____
_____	$_____	$_____

7. State the persons who rely on you or your spouse for support. NA

Name	Relationship	Age
_____	_____	_____
_____	_____	_____
_____	_____	_____

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	$ NA	$_____
Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	$_____	$_____
Home maintenance (repairs and upkeep)	$_____	$_____
Food	$_____	$_____
Clothing	$_____	$_____
Laundry and dry-cleaning	$_____	$_____
Medical and dental expenses	$_____	$_____
Transportation (not including motor vehicle payments)	$ NA	$_____
Recreation, entertainment, newspapers, magazines, etc.	$_____	$_____
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$_____	$_____
Life	$_____	$_____
Health	$_____	$_____
Motor Vehicle	$_____	$_____
Other: Court Costs - totaling near $5,000 to date	$_____	$_____
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$_____	$_____
Installment payments		
Motor Vehicle	$_____	$_____
Credit card(s)	$_____	$_____
Department store(s)	$_____	$_____
Other: _____	$_____	$_____
Alimony, maintenance, and support paid to others	$_____	$_____
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$_____	$_____
Other (specify): _____	$_____	$_____
Total monthly expenses: Everything but $2,000 in mortgages + Court Fees	$_____	$_____

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I only receive $7.00 per month, for stamps and necessities. I have no other income and getting $10-15.00 a month, for-sixteen.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: Febr. 3rd, 2003

(Signature)

ATE OF MICHIGAN - CIVIL ACTION

CERTIFICATE OF PRISONER ACCOUNT ACTIVITY
AND AFFIDAVIT REGARDING SUSPENSION OF PRISONER FEES/COSTS

Prisoner-Plaintiff/Petitioner/Appellant name and number		Defendant's/Respondent's/Appellee's name
John Mease aka Shakur Muhammad 213302	V	Mark Close

CERTIFICATE OF PRISONER ACCOUNT ACTIVITY

I am employed by the Michigan Department of Corrections at the facility identified below, at which the prisoner identified as the Plaintiff/Petitioner/Appellant is currently incarcerated.

Attached is a computer printout which accurately reflects the current spendable balance and all activity within this prisoner's account during the preceding twelve months or, if the prisoner has been incarcerated for less than twelve months, for the period of incarceration. Code "C" on the printout represents a withdrawal from the account and code "D" represents a deposit to the account. The attached printout reflects, for the reported period, an average monthly account deposit (i.e., total deposits divided by number of months) of $7.57, an average monthly account balance (i.e., total deposits minus total withdrawals divided by number of months) of ($16.61) There is a current spendable account balance of $0.00.

Date: 01/30/03 Asst Administrative Officer
Signature/Title

Ionia Maximum Facility
Correctional Facility

Note: Bottom section to be completed by prisoner and sent by prisoner to a Michigan court along with State civil pleading/claim of appeal.

AFFIDAVIT REGARDING SUSPENSION OF PRISONER FEES/COSTS

1. I am the Plaintiff/Respondent/Appellant in the attached pleading/petition/claim of appeal.

2. I am asking the court for suspension of filing fees and costs because I am indigent as reflected in the Cerificate of Prisoner Account Activity and attached computer printout.

2-5-03
Prisoner's Signature

Subscribed and sworn to before me, a Notary Public, this 6 day of February, 2003
Darrell Kelley

My Commission Expires:

CSJ-276 8/97
4835-3276

'chigan Department Of Corrections

Trust Account Statement

For the period 02/26/2002 to 01/30/2003

MDOC Nbr.: 213302 Name: MEASE, JOHN EUGENE Current Lock Loc.: 3-068
Birth Date: 04/13/1962 Location: IONIA MAXIMUM CORRECTION Jurisdiction Dates: 11/30/1990 Active: Yes
Current Balance: .00 Hold Balance: .00 Account Dates: 02/26/2002 A/C. Status: Active

Sub Account Details

Account Code	Account Name	Balance As of 02/26/2002	Balance As of 01/30/2003
Trust-Ionia Maximum Caseload			
2101	Offender Funds	0.00	0.00
2198	Freeze	0.00	0.00
Trust-Alger Maximum Caseload			
2101	Offender Funds	0.00	0.00
2198	Freeze	0.00	0.00
Trust-Marquette Prison Caseload			
2101	Offender Funds	0.00	0.00
2198	Freeze	0.00	0.00
Trust-Standish Facility Caseload			
2101	Offender Funds	0.00	0.00
2198	Freeze	0.00	0.00

Debts & Obligations

Deduction Type		Information No.	Effective Date	Original Amount	Amount Paid	Amount Owed
Trust-Ionia Maximum Caseload						
LSO	Legal Supplies Obligation	861129	05/10/2002	2.50	0.00	2.50
LSO	Legal Supplies Obligation	1202515	06/11/2002	1.65	0.00	1.65
OC	Federal Filing Fee	98-CV-10153-BC	09/15/1998	150.00	0.00	150.00
OCIS	Indigent Loan Obligation	ID9394 08/98	09/01/1998	1.88	0.00	1.88
ODEN	Dental Fee(s) Obligation	HCD346 12/17/97	01/02/1998	3.00	0.00	3.00
ODEN	Dental Fee(s) Obligation	3793420	01/27/2003	3.00	0.00	3.00
OLCST	Legal Copies (State)	I12583 11/01	12/03/2001	15.60	0.00	15.60
OLCST	Legal Copies (State)	I12849 02/02	02/26/2002	1.20	0.00	1.20
OLCST	Legal Copies (State)	2708571	10/21/2002	1.40	0.00	1.40
OLPOS	Legal Postage (State)	ID8541 08/97	09/02/1997	1.60	0.00	1.60
OLPOS	Legal Postage (State)	ID8624 09/97	10/02/1997	0.32	0.00	0.32
OLPOS	Legal Postage (State)	ID9701 12/98	01/04/1999	1.28	0.00	1.28
OLPOS	Legal Postage (State)	ID9775 01/99	02/01/1999	1.11	0.00	1.11
OLPOS	Legal Postage (State)	I10028 03/99	04/01/1999	0.99	0.00	0.99
OLPOS	Legal Postage (State)	I10104 04/99	05/03/1999	1.21	0.00	1.21
OLPOS	Legal Postage (State)	I10648 10/99	11/01/1999	0.66	0.00	0.66
OLPOS	Legal Postage (State)	I10732 11/99	12/01/1999	0.99	0.00	0.99
OLPOS	Legal Postage (State)	I10800 12/99	01/05/2000	1.43	0.00	1.43
OLPOS	Legal Postage (State)	I11058 03/00	04/03/2000	0.33	0.00	0.33
OLPOS	Legal Postage (State)	I11370 07/00	08/01/2000	0.33	0.00	0.33
OLPOS	Legal Postage (State)	I11632 10/00	11/01/2000	0.33	0.00	0.33
OLPOS	Legal Postage (State)	I11896 02/01	03/01/2001	0.76	0.00	0.76
OLPOS	Legal Postage (State)	I12059 04/01	05/01/2001	0.68	0.00	0.68
OLPOS	Legal Postage (State)	I12326 08/01	09/06/2001	1.02	0.00	1.02
OLPOS	Legal Postage (State)	I12476 10/01	11/01/2001	0.80	0.00	0.80

Date: 01/30/2003 14:01:14

'chigan Department Of Corrections

Trust Account Statement

For the period 02/26/2002 to 01/30/2003

MDOC Nbr.: 213302 Name: MEASE, JOHN EUGENE Current Lock Loc.: 3-068
Birth Date: 04/13/1962 Location: IONIA MAXIMUM CORRECTION Jurisdiction Dates: 11/30/1990 Active: Yes
Current Balance: .00 Hold Balance: .00 Account Dates: 02/26/2002 A/C. Status: Active

Deduction Type		Information No.	Effective Date	Original Amount	Amount Paid	Amount Owed
Trust-Ionia Maximum Caseload						
OLPOS	Legal Postage (State)	I12567 11/01	12/03/2001	7.05	0.00	7.05
OLPOS	Legal Postage (State)	I12692 01/02	02/06/2002	3.67	0.00	3.67
OLPOS	Legal Postage (State)	I12834 02/02	02/26/2002	1.14	0.00	1.14
OLPOS	Legal Postage (State)	298931	03/21/2002	2.26	0.00	2.26
OLPOS	Legal Postage (State)	2004919	08/19/2002	0.34	0.00	0.34
OLPOS	Legal Postage (State)	2436541	09/27/2002	0.36	0.00	0.36
OLPOS	Legal Postage (State)	2436542	09/27/2002	0.60	0.00	0.60
OLPOS	Legal Postage (State)	2689793	10/18/2002	6.76	0.00	6.76
OMED	Medical Fee(s) and Cost(s)	HCC230	08/29/1997	3.00	0.00	3.00
OMED	Medical Fee(s) and Cost(s)	HCC292 10/1/97	10/02/1997	3.00	0.00	3.00
OMED	Medical Fee(s) and Cost(s)	HC1780 9/5/00	09/12/2000	3.00	0.00	3.00
OMED	Medical Fee(s) and Cost(s)	550779	04/12/2002	3.00	0.00	3.00
OMED	Medical Fee(s) and Cost(s)	2121920	08/30/2002	3.00	0.00	3.00
OMED	Medical Fee(s) and Cost(s)	3400001	12/19/2002	2.94	0.00	2.94
OSFF	State Filing Fee Obligation	207475	03/02/1998	19.36	16.24	3.12
TAX100	Tax Cost Obligation (100%)	96-CV-10053BC	09/15/1998	25.82	0.00	25.82
TAX100	Tax Cost Obligation (100%)	98-10153-BC	12/27/2002	755.64	0.00	755.64
Trust-Alger Maximum Caseload						
OCIS	Indigent Loan Obligation	HOO809 INDIGENT	04/11/1995	4.65	0.00	4.65
OCIS	Indigent Loan Obligation	HOO814 INDIGENT	04/27/1995	5.77	0.00	5.77
OCIS	Indigent Loan Obligation	HOO826 INDIGENT	05/22/1995	6.75	0.00	6.75
OCIS	Indigent Loan Obligation	HOO841 INDIGENT	06/22/1995	6.84	0.00	6.84
OLPOS	Legal Postage (State)	HOO799 LEGAL PO	03/15/1995	0.96	0.00	0.96
Trust-Marquette Prison Caseload						
OCIS	Indigent Loan Obligation	INDIGENT STORE	04/24/1996	7.00	0.00	7.00
OCIS	Indigent Loan Obligation	INDIGENT STORE	05/20/1996	6.40	0.00	6.40
OCIS	Indigent Loan Obligation	INDIGENT STORE	06/17/1996	6.95	0.00	6.95
OCIS	Indigent Loan Obligation	INDIGENT STORE	07/16/1996	6.95	0.00	6.95
OCIS	Indigent Loan Obligation	INDIGENT STORE	08/23/1996	6.90	0.00	6.90
OCIS	Indigent Loan Obligation	INDIGENT STORE	09/18/1996	6.70	0.00	6.70
OCIS	Indigent Loan Obligation	INDIGENT STORE	11/22/1996	6.95	0.00	6.95
OCIS	Indigent Loan Obligation	INDIGENT STORE	12/19/1996	7.00	0.00	7.00
OCIS	Indigent Loan Obligation	INDIGENT STORE	01/29/1997	5.65	0.00	5.65
OLPOS	Legal Postage (State)	POSTAGE LOAN I	01/08/1996	0.32	0.00	0.32
OLPOS	Legal Postage (State)	POSTAGE 3641	03/08/1996	0.32	0.00	0.32
OLPOS	Legal Postage (State)	POSTAGE IH364	03/08/1996	0.32	0.00	0.32
OLPOS	Legal Postage (State)	POSTAGE LOAN	03/19/1996	3.57	0.00	3.57
OLPOS	Legal Postage (State)	POSTAGE 3460	03/26/1996	0.96	0.00	0.96
OSTPR	State Property Destroyed	DAMAGES C0000	10/25/1996	61.67	0.00	61.67
Trust-Standish Facility Caseload						
NBO	Negative Balance Obligation		01/14/2002	6.88	0.00	6.88
OCIS	Indigent Loan Obligation		12/28/1993	6.56	0.00	6.56

Trust Account Statement

For the period 02/26/2002 to 01/30/2003

MDOC Nbr.: 213302 Name: MEASE, JOHN EUGENE Current Lock Loc.: 3-068
Birth Date: 04/13/1962 Location: IONIA MAXIMUM CORRECTION Jurisdiction Dates: 11/30/1990 Active: Yes
Current Balance: .00 Hold Balance: .00 Account Dates: 02/26/2002 A/C. Status: Active

Deduction Type		Information No.	Effective Date	Original Amount	Amount Paid	Amount Owed
Trust-Standish Facility Caseload						
OCIS	Indigent Loan Obligation		01/25/1994	6.92	0.00	6.92
OCIS	Indigent Loan Obligation		03/16/1994	6.99	0.00	6.99
OCIS	Indigent Loan Obligation		05/26/1994	6.95	0.00	6.95
OCIS	Indigent Loan Obligation		06/07/1994	6.43	0.00	6.43
OCIS	Indigent Loan Obligation		07/13/1994	7.00	0.00	7.00
OCIS	Indigent Loan Obligation		08/15/1994	6.98	0.00	6.98
OCIS	Indigent Loan Obligation		09/01/1994	4.97	0.00	4.97
OCIS	Indigent Loan Obligation		10/12/1994	6.98	0.00	6.98
OCIS	Indigent Loan Obligation		10/25/1994	5.35	0.00	5.35
OCIS	Indigent Loan Obligation		12/02/1994	4.00	0.00	4.00
OCIS	Indigent Loan Obligation		12/28/1994	5.90	0.00	5.90
OCIS	Indigent Loan Obligation		02/03/1995	6.95	0.00	6.95
OCIS	Indigent Loan Obligation		07/26/1995	6.10	0.00	6.10
OCIS	Indigent Loan Obligation		09/21/1995	7.00	0.00	7.00
OCIS	Indigent Loan Obligation		10/24/1995	6.90	0.00	6.90
OCIS	Indigent Loan Obligation		11/21/1995	6.90	0.00	6.90
OCIS	Indigent Loan Obligation		12/14/1995	6.70	0.00	6.70
OCIS	Indigent Loan Obligation		01/18/1996	6.95	0.00	6.95
OCIS	Indigent Loan Obligation		02/19/1997	6.60	0.00	6.60
OCIS	Indigent Loan Obligation		03/19/1997	7.00	0.00	7.00
OCIS	Indigent Loan Obligation		04/18/1997	7.00	0.00	7.00
OCIS	Indigent Loan Obligation		06/06/1997	7.00	0.00	7.00
OCIS	Indigent Loan Obligation		06/17/1997	6.90	0.00	6.90
OLCST	Legal Copies (State)		08/30/1995	0.64	0.00	0.64
OLCST	Legal Copies (State)		09/07/1995	0.32	0.00	0.32
OLCST	Legal Copies (State)		09/11/1995	0.80	0.00	0.80
OLCST	Legal Copies (State)		09/15/1995	29.10	0.00	29.10
OLPOS	Legal Postage (State)		08/24/1995	0.64	0.00	0.64
OLPOS	Legal Postage (State)		08/24/1995	0.64	0.00	0.64
OLPOS	Legal Postage (State)		08/30/1995	0.32	0.00	0.32
OLPOS	Legal Postage (State)		08/30/1995	0.96	0.00	0.96
OLPOS	Legal Postage (State)		08/31/1995	0.64	0.00	0.64
OLPOS	Legal Postage (State)		08/31/1995	2.94	0.00	2.94
OLPOS	Legal Postage (State)		09/11/1995	0.32	0.00	0.32
OLPOS	Legal Postage (State)		09/11/1995	3.72	0.00	3.72
OLPOS	Legal Postage (State)		09/15/1995	1.10	0.00	1.10
OLPOS	Legal Postage (State)		02/04/1997	5.14	0.00	5.14
OLPOS	Legal Postage (State)		03/12/2002	0.32	0.00	0.32
OMED	Medical Fee(s) and Cost(s)		10/17/1997	3.00	0.00	3.00
OMED	Medical Fee(s) and Cost(s)		03/13/1998	2,113.75	0.00	2,113.75

Transaction Details

Trust Account Statement

For the period 02/26/2002 to 01/30/2003

MDOC Nbr.: 213302 Name: MEASE, JOHN EUGENE Current Lock Loc.: 3-068
Birth Date: 04/13/1962 Location: IONIA MAXIMUM CORRECTION Jurisdiction Dates: 11/30/1990 Active: Yes
Current Balance: .00 Hold Balance: .00 Account Dates: 02/26/2002 A/C. Status: Active

GJ No.	Date	Description		Debit	Credit
Trust-Ionia Maximum Caseload					
17888	02/26/2002	***AD Admission/Transfer Receipt***	.00		
		1105 Admission Receipts		0.00	
		2101 Offender Funds			0.00
	Narration:	*Admission/Transfer Receipt*			
200175	03/14/2002	***SCH School Stipend Receipt***	10.03		
		1119 School Stipend Receipts		10.03	
		2556 State Filing Fee(s) Payable			1.03
		2101 Offender Funds			9.00
	Narration:	*Batch: 2224, Ref:*			
251685	03/18/2002	***CRT Commissary Regular Transaction***	8.97		
		2101 Offender Funds		8.97	
		2501 Payable to Commissary			8.97
	Narration:	*R Commissary TXN :*			
298931	03/21/2002	***LPOSD Legal Postage Disbursement (State)***	2.29		
		2101 Offender Funds		0.03	
		2509 Postage (State) Payable			0.03
	Narration:	*Batch: 7803, Ref:98-10153 -*			
550779	04/12/2002	***MEDD Medical Fee(s) & Cost(s) Disbursement***	3.00		
		2101 Offender Funds		0.00	
		2589 Medical Fee(s) & Cost(s) - Direct			0.00
	Narration:	*Batch: 18228, Ref:4/11 visit -*			
861129	05/10/2002	***LSD Legal Supplies Disbursement***	2.50		
		2101 Offender Funds		0.00	
		2590 Miscellaneous Payable - Direct			0.00
	Narration:	*Batch: 31323, Ref:U2 -*			
1202515	06/11/2002	***LSD Legal Supplies Disbursement***	1.65		
		2101 Offender Funds		0.00	
		2590 Miscellaneous Payable - Direct			0.00
	Narration:	*Batch: 45236, Ref:U3 -*			
1230796	06/13/2002	***SCH School Stipend Receipt***	1.18		
		1119 School Stipend Receipts		1.18	
		2101 Offender Funds			1.18
	Narration:	*Batch: 41536, Ref:*			
1548032	07/11/2002	***SCH School Stipend Receipt***	7.08		
		1119 School Stipend Receipts		7.08	
		2101 Offender Funds			7.08
	Narration:	*Batch: 56624, Ref:6/02*			
1819240	08/05/2002	***CRT Commissary Regular Transaction***	8.23		
		2101 Offender Funds		8.23	
		2501 Payable to Commissary			8.23
	Narration:	*R Commissary TXN :*			
2004919	08/19/2002	***LPOSD Legal Postage Disbursement (State)***	.37		
		2101 Offender Funds		0.03	
		2583 Postage (State) Payable - Direct			0.03
	Narration:	*Batch: 75954, Ref:98-CV-10153-BC -*			
2121920	08/30/2002	***MEDD Medical Fee(s) & Cost(s) Disbursement***	3.00		
		2101 Offender Funds		0.00	
		2589 Medical Fee(s) & Cost(s) - Direct			0.00
	Narration:	*Batch: 81413, Ref:8/27 visit -*			
2254258	09/12/2002	***SCH School Stipend Receipt***	12.98		
		1119 School Stipend Receipts		12.98	
		2556 State Filing Fee(s) Payable			3.98

Trust Account Statement

For the period 02/26/2002 to 01/30/2003

MDOC Nbr.: 213302 Name: MEASE, JOHN EUGENE Current Lock Loc.: 3-068
Birth Date: 04/13/1962 Location: IONIA MAXIMUM CORRECTION Jurisdiction Dates: 11/30/1990 Active: Yes
Current Balance: .00 Hold Balance: .00 Account Dates: 02/26/2002 A/C. Status: Active

GJ No.	Date	Description	Debit	Credit
Trust-Ionia Maximum Caseload				
		2101 Offender Funds		9.00
	Narration:	*Batch: 84748, Ref:*		
2325214	09/17/2002	***CRT Commissary Regular Transaction***	8.99	
		2101 Offender Funds	8.99	
		2501 Payable to Commissary		8.99
	Narration:	*R ... -Commissary TXN -*		
2436541	09/27/2002	***LPOSD Legal Postage Disbursement (State)***	.37	
		2101 Offender Funds	0.01	
		2583 Postage (State) Payable - Direct		0.01
	Narration:	*Batch: 93647, Ref:02-1043 -*		
2436542	09/27/2002	***LPOSD Legal Postage Disbursement (State)***	.60	
		2101 Offender Funds	0.00	
		2583 Postage (State) Payable - Direct		0.00
	Narration:	*Batch: 93647, Ref:02-1043 -*		
2570983	10/10/2002	***SCH School Stipend Receipt***	11.80	
		1119 School Stipend Receipts	11.80	
		2556 State Filing Fee(s) Payable		2.80
		2101 Offender Funds		9.00
	Narration:	*Batch: 95619, Ref:*		
2636726	10/15/2002	***CRT Commissary Regular Transaction***	8.96	
		2101 Offender Funds	8.96	
		2501 Payable to Commissary		8.96
	Narration:	*R ... -Commissary TXN -*		
2689793	10/18/2002	***LPOSD Legal Postage Disbursement (State)***	6.80	
		2101 Offender Funds	0.04	
		2583 Postage (State) Payable - Direct		0.04
	Narration:	*Batch: 103275, Ref:90-52017-FC -*		
2708571	10/21/2002	***LCSTD Legal Copies Disbursement (State)***	1.40	
		2101 Offender Funds	0.00	
		2581 Copies (State) Payable - Direct		0.00
	Narration:	*Batch: 104084, Ref: -*		
2960815	11/14/2002	***SCH School Stipend Receipt***	13.57	
		1119 School Stipend Receipts	13.57	
		2556 State Filing Fee(s) Payable		4.57
		2101 Offender Funds		9.00
	Narration:	*Batch: 109974, Ref:*		
3094165	11/25/2002	***CRT Commissary Regular Transaction***	8.97	
		2101 Offender Funds	8.97	
		2501 Payable to Commissary		8.97
	Narration:	*R ... -Commissary TXN -*		
3183723	12/05/2002	***SCH School Stipend Receipt***	10.62	
		1119 School Stipend Receipts	10.62	
		2556 State Filing Fee(s) Payable		1.65
		2101 Offender Funds		8.97
	Narration:	*Batch: 121697, Ref:*		
3214246	12/06/2002	***CRT Commissary Regular Transaction***	8.94	
		2101 Offender Funds	8.94	
		2501 Payable to Commissary		8.94
	Narration:	*R ... -Commissary TXN -*		
3400001	12/19/2002	***MEDD Medical Fee(s) & Cost(s) Disbursement***	3.00	
		2101 Offender Funds	0.06	

Trust Account Statement

For the period 02/26/2002 to 01/30/2003

MDOC Nbr.: 213302 Name: MEASE, JOHN EUGENE Current Lock Loc.: 3-068
Birth Date: 04/13/1962 Location: IONIA MAXIMUM CORRECTION Jurisdiction Dates: 11/30/1990 Active: Yes
Current Balance: .00 Hold Balance: .00 Account Dates: 02/26/2002 A/C. Status: Active

GJ No.	Date	Description	Debit	Credit
Trust-Ionia Maximum Caseload				
		2589 Medical Fee(s) & Cost(s) - Direct		0.06
	Narration:	*Batch: 130057, Ref:12/11 visit -*		
3589958	01/09/2003	***SCH School Stipend Receipt***	11.21	
		1119 School Stipend Receipts	11.21	
		2556 State Filing Fee(s) Payable		2.21
		2101 Offender Funds		9.00
	Narration:	*Batch: 134502, Ref:*		
3658635	01/14/2003	***MEDD Medical Fee(s) & Cost(s) Disbursement***	3.00	
		2101 Offender Funds	3.00	
		2589 Medical Fee(s) & Cost(s) - Direct		3.00
	Narration:	*Batch: 139216, Ref:1/13/02 visit -*		
3717551	01/17/2003	***CRT Commissary Regular Transaction***	6.00	
		2101 Offender Funds	6.00	
		2501 Payable to Commissary		6.00
	Narration:	*R ... -Commissary TXN -*		
3793420	01/27/2003	***DEND Dental Co-Pay Disbursement***	3.00	
		2101 Offender Funds	0.00	
		2588 Dental Fee(s) Payable - Direct		0.00
	Narration:	*Batch: 144260, Ref:1/8 visit -*		
Trust-Standish Facility Caseload				
3733787	01/21/2003	***REL Release***	.00	
		2101 Offender Funds	0.00	
	Narration:	*TRF ICF*		

Total Receipts:	***78.47***
Total Disbursments:	***90.04***

Michigan Department Of Correctio

RACCS History Report

Date Range: 01/30/2002 - 02/26/2002

MDOC Nbr.: 213302
Offender Name: MEASE, JOHN EUGE

Location	Code	Date	Amount	Sub Code	Batch #	Assn #	Narrative
ICF	D	02/14/2002	12.39	110	025044		JAN SCHOOL PAYROLL
ICF	C	02/19/2002	9.00	092	C93603		STORE PURCHASE
ICF	C	02/22/2002	3.83	034	025080		PD FF 207475
ICF	C	02/22/2002	2.23	034	025080		PD FF 207475
ICF	C	02/22/2002	3.57	034	025080		PD FF 207475
ICF	C	02/22/2002	4.28	034	025080		PD FF 207475
ICF	C	02/22/2002	6.57	034	025080		PD FF 207475
ICF	C	02/22/2002	1.85	034	025080		PD FF 207475
ICF	C	02/22/2002	1.80	039	025077		PD CC 96-CV-10053BC
ICF	C	02/22/2002	4.91	034	025080		PD FF 207475
ICF	C	02/22/2002	4.34	034	025080		PD FF 207475
ICF	C	02/22/2002	6.04	034	025080		PD FF 207475
ICF	C	02/22/2002	3.39	034	025080		PD FF 207475
ICF	C	02/22/2002	4.36	034	025080		PD FF 207475
ICF	C	02/22/2002	4.21	034	025080		PD FF 207475
ICF	C	02/22/2002	4.41	034	025080		PD FF 207475
ICF	C	02/22/2002	6.60	034	025080		PD FF 207475
ICF	C	02/22/2002	.31	039	025077		PD CC 96-CV-10053BC
ICF	C	02/22/2002	1.64	034	025080		PD FF 207475
ICF	C	02/22/2002	5.98	034	025080		PD FF 207475
ICF	C	02/22/2002	4.83	034	025080		PD FF 207475
ICF	C	02/22/2002	5.45	034	025080		PD FF 207475
ICF	C	02/22/2002	2.59	034	025080		PD FF 207475
ICF	C	02/22/2002	6.03	034	025080		PD FF 207475
ICF	C	02/22/2002	4.37	034	025080		PD FF 207475
ICF	C	02/22/2002	1.43	039	025077		PD CC 96-CV-10053BC
ICF	C	02/22/2002	1.85	034	025080		PD FF 207475
ICF	C	02/22/2002	5.39	034	025080		PD FF 207475
ICF	C	02/22/2002	3.18	039	025077		PD CC 96-CV-10053BC
ICF	C	02/22/2002	4.93	034	025080		PD FF 207475
ICF	C	02/22/2002	5.90	034	025080		PD FF 207475
ICF	C	02/22/2002	5.98	034	025080		PD FF 207475
ICF	C	02/22/2002	3.99	034	025080		PD FF 207475
ICF	C	02/22/2002	6.78	034	025080		PD FF 207475
ICF	C	02/22/2002	4.80	034	025080		PD FF 207475
ICF	C	02/22/2002	5.26	034	025080		PD FF 207475
ICF	C	02/22/2002	6.01	034	025080		PD FF 207475
ICF	C	02/22/2002	4.97	034	025080		PD FF 207475
ICF	C	02/22/2002	2.27	034	025080		PD FF 207475
ICF	C	02/22/2002	4.84	034	025080		PD FF 207475
ICF	C	02/22/2002	4.61	034	025080		PD FF 207475

Date: 01/30/2003 14:01:26

Michigan Department Of Correctio

RACCS History Report

Date Range: 01/30/2002 - 02/26/2002

MDOC Nbr.: 213302
Offender Name: MEASE, JOHN EUGE

Location	Code	Date	Amount	Sub Code	Batch #	Assn #	Narrative
ICF	C	02/22/2002	5.39	034	025080		PD FF 207475
ICF	C	02/22/2002	4.29	034	025080		PD FF 207475
ICF	C	02/22/2002	6.04	034	025080		PD FF 207475
ICF	C	02/22/2002	4.86	039	025077		PD CC 96-CV-10053BC
ICF	C	02/25/2002	4.86	034	25080A		PD FF 207475

Total Deposits (D): $12.39
Total Charges (C): $200.22

ORIGINAL

No. 02-9065

Supreme Court, U.S.
FILED
FEB 11 2003
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

SHAKIR MUHAMMAD — PETITIONER
(Your Name)

vs.

MARK CLOSE — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court Of Appeals For The Sixth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

SHAKIR Muhammad
(Your Name)

1576 Bluewater Hwy.
(Address)

Ionia, Michigan 48846
(City, State, Zip Code)

None
(Phone Number)

QUESTION(S) PRESENTED

I. IS THE APPELLATE COURT'S HOLDING CONTRARY TO RULES PROMULGATED BY THIS COURT PURSUANT TO TITLE 28 U.S.C. §2072, SPECIFICALLY FEDERAL RULES OF CIVIL PROCEDURE, RULE 15 (A);

II. IS THE APPLICATION OF THE "FAVORABLE-TERMINATION REQUIREMENT" OF HECK V. HUMPHREY, 512 U.S. 477 (1994) AS APPLIED IN HUEY V. STINE, 230 F.3d 226 (6th Cir. 2000) THE CORRECT STANDARD FOR ANALYZING 42 U.S.C. §1983 CLAIMS BY PRISONERS THAT ARE NO LONGER "IN CUSTODY" FOR PURPOSES OF 28 U.S.C. §2254 HABEAS CORPUS RELIEF OR DOES THIS COURT'S HOLDING IN SPENCER V. KEMNA, 523 U.S. 1, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998) STATE ANOTHER PRECEDENT, AND HOW DOES EITHER DOCTRINE APPLY TO THIS CASE; AND,

III. DID THE APPELLATE COURT ERROR IN AFFIRMING THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT IN THIS CASE?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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CASES	PAGE NUMBER
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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix C to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
☒ is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

I.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was SEPT. 23RD, 2002

[ ] No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: NOV. 14TH, 2002, and a copy of the order denying rehearing appears at Appendix B.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIRST AMENDMENT OF U.S. CONSTITUTION:
CONGRESS SHALL MAKE NO LAW RESPECTING AN ESTABLISHMENT OF RELIGION, OR PROHIBITING THE FREE EXERCISE THEREOF; OR ABRIDGING THE FREEDOM OF SPEECH, OR OF THE PRESS, OR THE RIGHT OF THE PEOPLE PEACEABLY TO ASSEMBLE, AND TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES.

42 U.S.C. §1983: EVERY PERSON WHO, UNDER COLOR OF ANY STATUTE, ORDINANCE, REGULATION, CUSTOM, OR USAGE, OF ANY STATE OR TERRITORY OR THE DISTRICT OF COLUMBIA, SUBJECTS, OR CAUSES TO BE SUBJECTED, ANY CITIZEN OF THE UNITED STATES OR OTHER PERSON WITHIN THE JURISDICTION THEREOF TO THE DEPRIVATION OF ANY RIGHTS, PRIVILEGES, OR IMMUNITIES SECURED BY THE CONSTITUTION AND LAWS, SHALL BE LIABLE TO THE PARTY INJURED IN AN ACTION AT LAW, SUIT IN EQUITY, OR OTHER PROPER PROCEEDING FOR REDRESS. FOR THE PURPOSES OF THIS SECTION, ANY ACT OF CONGRESS APPLICABLE EXCLUSIVELY TO THE DISTRICT OF COLUMBIA SHALL BE CONSIDERED TO BE A STATUTE OF THE DISTRICT OF COLUMBIA.

28 USC §2072: AUTHORITY FOR PROMULGATION OF RULES....

28 USC §2254: HABEAS CORPUS STATUTE...

FEDERAL RULE OF CIVIL PROCEDURE, RULE 15 (a). AMENDMENTS.
A PARTY MAY AMEND THE PARTY'S PLEADING ONCE AS A MATTER OF COURSE AT ANY TIME BEFORE A RESPONSIVE PLEADING IS SERVED OR, IF THE PLEADING IS ONE TO WHICH NO RESPONSIVE PLEADING IS PERMITTED AND THE ACTION HAS NOT BEEN PLACED UPON THE TRIAL CALENDAR, THE PARTY MAY SO AMEND IT AT ANY TIME WITHIN 20 DAYS AFTER IT IS SERVED. OTHERWISE A PARTY MAY AMEND THE PARTY'S PLEADING ONLY BY LEAVE OF COURT OR BY WRITTEN CONSENT OF THE ADVERSE PARTY; AND LEAVE SHALL BE FREELY GIVEN WHEN JUSTICE SO REQUIRES....

STATEMENT OF THE CASE

Petitioner filed this civil rights action under 42 USC §1983 in June of 1998 while incarcerated within the Michigan Department of Corrections (MDOC) at Ionia Maximum Facility, he was imprisoned at Standish Maximum Facility (SMF) at all times relevant to this suit. The Respondent, Mark Close is a correctional officer at SMF. Petitioner's complaint alleges first Respondent violated his First Amendment Right to petition by retaliating against him for prior lawsuits and grievances filed against Respondent and others. Respondent accomplished this retaliation by instigating an incident with Petitioner on May 21st, 1997, and then writing a misconduct Report for a greater offense than first merited by Petitioner's conduct, resulting in Petitioner being confined to pre-hearing detention. Petitioner filed his complaint requesting expungement of the misconduct, compensatory and punitive damages. Appendix C, U.S. Court of Appeals Joint Appendix (J.A.), at p. 14. Respondent submitted his first Motion for Dismissal or Summary Judgment on 7-31-98. Appendix C, pp. 17-30. Petitioner submitted a response in opposition and moved for leave to amend his complaint. Appendix D, Motion to Amend Complaint. Petitioner submitted copies of his Exhibits A thru C on 8-17-98 to be attached to Complaint. See Appendix E. The Magistrate Judge Recommended that Respondent Motion to dismiss or for summary judgment be denied and that Petitioner's Motion to amend be granted. Appendix C, pp. 31-65. Respondent filed objection with NO opposition to the Petitioner's

Motion to amend. The district court adopted the Report of the Magistrate and Petitioner submitted his Amended Complaint. Appendix C, pp. 66-83, District Court Adopts Magistrates Report and Amended Complaint.

The district court then appointed Wendy Kaune to represent Petitioner and Ms. Kaune proceeded through the discovery stage with no prior experience in prisoner litigation. Depositions were conducted without Petitioner. Appendix C, J.A., p. 84. Respondent submitted another motion to dismiss on grounds of failure to exhaust and lack of physical injury under Prisoner Litigation Reform Act. Appendix C, pp. 85-120 of J.A. The Magistrate Recommended that the motion be denied and the district court adopted the Magistrates Report. Appendix C, J.A., pp. 122-134.

Following discovery, the Respondent again moved for summary judgment. Appendix C, J.A., pp. 135-186. Petitioner's counsel submitted a Motion in Opposition. Appendix C, J.A., 187-205. The Magistrate Recommend that Respondents Motion for Summary Judgment be granted. Appendix C, J.A., pp. 215-232. Petitioner's appointed Refused to submit a response in opposition, and Petitioner motioned the court for leave to file a pro se response in opposition which the court granted. Appendix F, Order Granting Extention of Time To File Objections. The district court adopted the Magistrates Report and granted summary judgment to Respondent. Appendix C, J.A., pp. 321-326. Petitioner filed his Notice of Appeal in pro se. Appendix C, J.A., pp. 327-341.

On Appeal, Petitioner argued that genuine issues of

Material fact exists precluding the grant of summary judgment with respect to whether Respondent retaliated against him in violation of the First Amendment. Appendix-G, Appellants Brief. Respondent submitted his Brief on Appeal. Appendix H. Petitioner submitted a Reply Brief. Appendix-I. The Appellate court affirmed the judgment of the district court stating that Petitioners claim was barred by the doctrine of Heck v. Humphrey, 512 US 477 (1994). Appendix A, p.2.

Petitioner moved the appeals court for rehearing on 9-26-02 and the court denied his petition on 11-14-02. See Appendix J and Appendix B, respectively.

Petitioner now seeks certiorari with this Court contending that the Sixth Circuit's Application of Heck, as stated in Huey v. Stine, 230 F.3d 226 (2000) is in conflict with other circuits and is an erroneous application of the Heck doctrine in light of this Courts holding in Spencer v. Kenna, 523 US 477 (1998). Petitioner also contends that the Appellate courts holding is erroneous because it is based upon requests made in the original complaint, that were omitted from the amended complaint which lawfully supersedes the original complaint.

REASONS FOR GRANTING THE PETITION

In the 9-23-02 Order of the Sixth Circuit, the court concluded:

> "The plaintiff... requests that "the misconduct charges [be] expunged from his file." J.A. at 14. Thus this case falls directly within the doctrine of Heck v. Humphrey, 512 US 477 (1994), which this circuit applied to a prisoner seeking damages and expungement of a disciplinary infraction in Huey v. Stine, 230 F.3d 226, 228 (6th Cir. 2000). "In order to grant the plaintiff in this case the relief he seeks, we would have to unwind the judgment of the state agency." Id. at 230. Thus Heck bars the plaintiffs action under 42 USC §1983."

Appendix A, COA Order 9-23-02, p.2.

Petitioner moved the court for rehearing pursuant to Fed. R. App. Pro., Rule 40 (A)(2) and the court denied the petition for rehearing on 11-14-02. See Appendix J, Petition For Rehearing submitted on 9-26-02 and Appendix B, Order Denying Petition.

Accordingly, Petitioner states the following reasons this Court should grant this petition for certiorari:

I. THE APPELLATE COURT'S HOLDING IS CONTRARY TO RULES PROMULGATED BY THIS COURT PURSUANT TO TITLE 28 USC §2072.

The Congress of the United States gave statutory authority to promulgate Rules of Civil Procedure to

the Supreme Court pursuant to 28 USC §2072. This Court, in its discretion, promulgated Federal Rule of Civil Procedure (FRCP), Rule 15 (A) which provides in relevant part that:

> ... a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. Fed.R.Civ.P., Rule 15(A).

On 6-2-98, Petitioner submitted his original complaint stating issues of First Amendment retaliation by Respondent. Appendix C, J.A., pp. 10-16. On 7-31-98, Respondent submitted his first Motion to Dismiss or for Summary Judgment. Appendix C, J.A., 17-30. In response to Respondent's Motion, Petitioner submitted a Motion in Opposition, and a Motion to Amend his Complaint. Appendix D, Motion To Amend Complaint. On 11-24-98, the district court Magistrate submitted his recommendation to the district court judge suggesting that Petitioner's Motion to Amend his complaint be granted, and stated that "[p]laintiff is not seeking to add or change any factual allegations, and considering that Defendant has not registered any opposition to the Motion to Amend, I conclude that the Defendant would not be prejudiced by this Court's allowing the Plaintiff to Amend his complaint. Appendix C, J.A., p. 38. The district court entered order Adopting the Magistrate's report and on 4-7-99 Petitioner submitted his Amended Complaint. Appendix C, J.A. pp. 66-83.

As stated above, the court held that "plaintiff... requests

that "the misconduct charge [be] expunged from his file." J.A. at 14...," and when the court was notified by petition for rehearing that such requests were omitted from the Amended Complaint, the court refused to acknowledge the error. See Appendix J and B, respectfully.

Petitioner argues that the court errored in referring to the original complaint instead of the amended complaint which lawfully supersedes the prior pleadings. See Luckett v. Tuenes, 18 F.Supp2d 835 (W.D.Tenn. 1998) (An amended complaint supersedes the prior complaint...) Also see Ping Tau Bion v. Taylor, 23 Fed.Appx. 75 (CA 2 NY, 2001) (An amended complaint ordinarily supersedes the original and renders it of no legal effect); Armstrong v. Davis, 275 F.3d 849, (CA 9 Cal, 2001) (Amended pleadings supersede original.); and Meterlogic, Inc., v. Copier Solutions, Inc., 185 F.Supp2d 1292 (S.D Fla, 2002) (An Amended complaint supersedes a previously filed complaint.)

Petitioner further contends that to allow the Appellate court to manipulate the record for purposes of expediately disposing of prisoner claims, would only result in more open disregard of the few rights prisoners possess.

Petitioner believes he is entitled to relief from the judgment of the court and petitions this Court for Certiorari Relief.

II. THE APPELLATE COURT ERRORED IN APPLYING THE DOCTRINE OF HECK TO THIS CASE AND THE HECK DOCTRINE DOES NOT BAR PETITIONER'S FIRST AMENDMENT CLAIM.

Petitioner initiated this Claim under 42 USC §1983 alleging that Respondent violated his First Amendment Right to petition by retaliating against him for prior lawsuits and grievances filed against Respondent and others while confined at SMF, and that Respondent accomplished this retaliation by instigating a confrontation with Petitioner then charging him with misconduct greater than that warranted which required him to be confined to pre-hearing detention for 6 days. Petitioner was found not guilty of the exaggerated charge of threatening behavior and was sentenced to 7 days detention and 30 days loss of privileges for the less serious charge of Insolence. Appendix E, Exhibit A- Misconduct Hearing Report. Petitioner does not challenge that decision, but does challenge the facts resulting in his being unconstitutionally placed on pre-hearing detention for an exaggerated charge.

The Appeals court held that:

"...this case falls directly within the doctrine of Heck v. Humphrey, 512 US 477 (1994), which this circuit applied to a prisoner seeking damages and expungement of a disciplinary infraction in Huey v. Stine, 230 F.3d 226, 228 (6th Cir. 2000)." In order to grant the plaintiff in this case the relief he seeks, we would have to unwind the judgment of the state agency." Id. at 230. Thus Heck bars plaintiff's action under 42 USC §1983." Appendix A, p. 2.

Petitioner contends that the court erroneously applied Heck to this case.

In Heck, this Court decided whether a plaintiff may bring a §1983 claim for damages that challenges the underlying conviction or sentence and concluded that claims that call into question the lawfulness of a conviction or confinement should not be cognizable under §1983. Id. at 484-87, 114 S Ct 2364.

Petitioner concedes that §1983 is not a substitute for a writ of habeas corpus submitted under 28 USC §2254.

In Preiser v. Rodriguez, 411 US 475 (1973), this Court explained that a prisoner may properly bring suit under §1983, however a prisoner challenging "the fact or length of his custody" must pursue his claim through a writ of habeas corpus. This Court held that Preiser does not bar a §1983 claim where an inmate seeks an injunction to require a hearing to determine whether there was probable cause for pretrial detention. Gerstein v. Pugh, 420 US 103, 107-08 (1975). This Court held that a successful claim by a prisoner would not lead to vacation of his conviction. Id. at 119.

In Heck, this Court held that if a §1983 claim by a prisoner would necessarily imply the invalidity of a conviction the court must dismiss the complaint unless the plaintiff can demonstrate that the conviction has been reversed, expunged, or called into question by federal court's issuance of a writ of habeas corpus. Id. at 2372.

In Spencer v. Kenna, 523 U.S. 1, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998), this Court's latest Ruling on this issue, the Justices took the opportunity to clarify their positions regarding the scope

of the Heck Rule in the opinion of Justice Souter, who was joined by Justices O'Connor, Ginsburg and Breyer, who wrote: "The better view, then, is that a former prisoner, no longer "in custody," may bring a §1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy." Id. at 990, 118 S.Ct 978 (Souter, J., concurring). Justice Ginsburg reiterated her agreement in her separate concurrence: I have come to agree with Justice Souter's reasoning: Individuals without recourse to the habeas statute because they are not 'in custody'... fit within §1983's 'broad reach'. Id.

In Jenkins v. Haubert, 179 F3d 19 (2nd Cir. 1999), the court held that this Court simply never has "announced that the Heck rule bars a prisoner's challenge under §1983 to an administrative or disciplinary sanction that does not affect the overall length of confinement." Jenkins, 179 F3d at 27, as quoted from Dewalt v. Carter, 224 F3d 607, 616 (7th Cir. 2000).

In Dewalt, the court concluded that: "... [W]e, like the Second Circuit in Jenkins, are hesitant to apply the Heck rule in such a way as would contravene the pronouncement of five sitting Justices. See id. The concurring and dissenting opinions in Spencer reveal that five Justices now hold the view that §1983 action must be available to challenge constitutional wrongs where federal habeas is not available. Although this perspective

originally had been a minority view, it is not after Spencer." Id. at 116-17.

There is clear conflict in the Circuit Courts regarding the application of the Heck rule after Spencer and Petitioner believes it imperative that this Court decide this issue.

The First and Sixth Circuits rely on Agostini v. Felton, 117 S.Ct 1997, 2017, (1997), in which this Court "admonished the lower courts to follow its directly applicable precedent, even if that precedent appears weakened by pronouncements in its subsequent decisions, and leave to the Court "the prerogative of overruling its own decisions." (As quoted from Figueroa v. Rivera, 147 F3d 77, N.3 (1st Cir. 1998).)

The Seventh Circuit countered in Dewalt, stating that: "Here, however, we rely on the separate opinions not to overrule precedent, but to help guide us in deciding an open question." Id. 224 F3d at 617, N.5.

In this case, on Nov. 24th, 1998 the Magistrate Elaborated on this issue in his Report, stating that "Even if Justice Ginsburg's change of position was not considered, Heck and Balisok still would not prevent this case from proceeding." Appendix C, J.A. p. 59. Accordingly, Petitioner incorporates the Magistrate's Report in his argument as it precedes the Sixth Circuit Ruling in this which was decided in Sept. 1999. Appendix C, J.A. pp. 53-59.

Petitioner Maintains that his §1983 claim is not barred by Heck as his requested relief is based solely upon the Respondent's Retaliatory imposition of an exaggerated misconduct charge which resulted in Petitioner's unwarranted confinement to

pre-hearing detention for 6 days. Appendix E, Exhibit A.
The imposition of the 6 days of mandatory pre-hearing detention is at issue, and whether Respondent intentionally exaggerated the misconduct charge for the purposes of retaliating against Petitioner for exercising his Right to petition and having Petitioner removed from the Retail freedoms of the general population setting. Appendix C., J.A., pp. 56-59.

Like unto this Courts holding in Gerstein, the success of this claim would not lead to a vacation of the misconduct conviction for insolence. Id. at 119.

Petitioner Maintains that he was neither "in custody" for purposes of obtaining habeas Relief pursuant to §2254.

As stated in the preceeding 'Argument I' of this petition, the Appellate court's holding that Petitioner "requests that the misconduct charge [be] expunged from his file," is an evident error by the court, as Petitioner's Amended Complaint makes No Request for expungement of the misconduct. Appendix A, at p. 2 and Appendix C, J.A. at p. 83, Respectively.

For the Reasons stated herein, Petitioner believes he is entitled to certiorari relief from the Judgment of the Appellate court.

III. THE APPELLATE COURT ERRORED IN AFFIRMING THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT IN THIS CASE.

Petitioner initiated his pro se Appeal arguing that: 1.) the court erred in concluding that he had failed to establish the causal connection element of his Retaliation claim; and

2.) disputed issues of material fact exist precluding the district courts grant of summary judgment. Appendix G, Petitioner's Brief on Appeal.

Respondent submitted ~~a Reply~~ his Brief on Appeal contending that the district court properly granted summary judgment. Appendix H, Respondent's Brief on Appeal.

Petitioner submitted a Reply Brief in opposition. Appendix-I, Petitioner's Reply Brief.

In the Appellate courts order, the court made No specific Reference to the issues argued on appeal other than stating that," We affirm the judgment of the district court." Appendix-A, p. 2. Also, see Appendix C, J.A., 12-17-01 Dist. Court Judgment, pp. 321-26.

Petitioner, therefore Maintains and incorporates herein the arguments set forth in his Appellate briefs, and requests this Court to grant his Request for certiorari Relief as material issues of fact exist in this case Requiring submission to a jury.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Shakur Muhammad

Date: Feb. 3rd, 2003

No. 02-1043

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
SEP 23 2002
LEONARD GREEN, Clerk

SHAKUR MUHAMMAD, also known as John E. Mease,

Plaintiff-Appellant,

v.

MARK CLOSE, Correctional Officer,

Defendant-Appellee.

ORDER

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
This notice is to be prominently displayed if this decision is reproduced.

Before: MARTIN, Chief Judge; MOORE, Circuit Judge; WISEMAN, District Judge.*

Shakur Muhammad appeals a district court grant of summary judgment for defendant in this civil rights action filed under 42 U.S.C. § 1983. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Muhammad filed his complaint in the district court alleging that the defendant corrections officer falsely charged him with major misconduct threatening behavior in retaliation for prior lawsuits and grievances plaintiff filed against defendant. Plaintiff named defendant in his individual and official capacities and sought compensatory and punitive damages and expungement of the resulting misconduct conviction on a reduced charge of insolence. Defendant moved to dismiss the complaint or for summary judgment, and plaintiff responded in opposition and moved for leave to amend his complaint. The magistrate judge recommended that defendant's motion to dismiss or for summary judgment be denied and that plaintiff's motion to amend his complaint be granted, and

*The Honorable Thomas A. Wiseman, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.

"APPENDIX A"

defendant filed objections. The district court adopted the magistrate judge's recommendation and denied defendant's motion, and plaintiff filed an amended complaint.

Thereafter, the magistrate judge appointed counsel to represent plaintiff, and defendant moved to dismiss the complaint for failure to exhaust administrative remedies. The magistrate judge recommended that the motion to dismiss be denied, and defendant filed objections. The district court adopted the magistrate judge's recommendation and denied defendant's motion to dismiss.

Following discovery, defendant again moved the district court for summary judgment, plaintiff responded in opposition, and defendant submitted a reply. The magistrate judge recommended that summary judgment for defendant be granted, and the district court granted plaintiff leave to file pro se objections after counsel declined to do so. The district court adopted the magistrate judge's recommendation and granted summary judgment for defendant. Plaintiff filed a timely notice of appeal pro se. On appeal, plaintiff contends that he established a genuine issue of material fact remaining for trial with respect to whether defendant retaliated against him in violation of the First Amendment. Defendant responds that the district court's judgment was proper.

Upon de novo review, *see Brooks v. Am. Broad. Cos.*, 932 F.2d 495, 500 (6th Cir. 1991), we affirm the judgment of the district court. The plaintiff seeks punitive and compensatory damages and requests that "the misconduct charge [be] expunged from his file." J.A. at 14. Thus this case falls directly within the doctrine of *Heck v. Humphrey*, 512 U.S. 477 (1994), which this circuit applied to a prisoner seeking damages and expungement of a disciplinary infraction in *Huey v. Stine*, 230 F.3d 226, 228 (6th Cir. 2000). "In order to grant the plaintiff in this case the relief he seeks, we would have to unwind the judgment of the state agency." *Id.* at 230. Thus *Heck* bars the plaintiff's action under 42 U.S.C. § 1983.

Accordingly, the district court's judgment is affirmed. *See* Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
NOV 14 2002
LEONARD GREEN, Clerk

SHAKUR MUHAMMAD, also known as John E. Mease,

Plaintiff-Appellant,

v.

MARK CLOSE, Correctional Officer,

Defendant-Appellee.

ORDER

Before: MARTIN, Chief Judge; MOORE, Circuit Judge; WISEMAN, District Judge.*

Shakur Muhammad petitions the court to rehear its September 23, 2002, order that affirmed a district court grant of summary judgment for defendant in this civil rights action filed under 42 U.S.C. § 1983.

Upon consideration, the panel concludes that it acted under no misapprehension of law or fact in issuing its order. *See* Fed. R. App. P. 40(a).

Accordingly, the petition for a rehearing is denied.

ENTERED BY ORDER OF THE COURT

Clerk

*The Honorable Thomas A. Wiseman, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.

"APPENDIX B"

R.86

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

ATTORNEY GENERAL
CORRECTIONS DIVISION

DEC 19 2001

SHAKUR MUHAMMAD
a/k/a/ John Mease,

Plaintiff,

v.

MARK CLOSE,

Defendant.
_____/

Case No. 98-CV-10153-BC
Honorable David M. Lawson

OPINION AND ORDER ADOPTING REPORT AND RECOMMENDATION AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The plaintiff filed this prisoner civil rights complaint against the defendant, a corrections officer, alleging unlawful retaliation contrary to 42 U.S.C. § 1983. After two previous dispositive motions were denied, the defendant filed his third motion for summary judgment, alleging that the plaintiff offered insufficient evidence to proceed to trial on his First Amendment retaliation claim. After reviewing the initial motion papers, the plaintiff's response, and the defendant's reply brief, the Magistrate Judge, operating under a full-case reference pursuant to 28 U.S.C. § 636(b)(1), recommended that the defendant's motion be granted. After the plaintiff's pro bono counsel declined to file objections on his behalf, the plaintiff requested the right to file his own objections, and the Court granted that request on November 8, 2001. The plaintiff filed his objections on November 29, 2001. After *de novo* review of the Magistrate Judge's Report and Recommendation, and the papers filed in this case, the Court agrees that the defendant's motion should be granted.

I.

This case arose from an incident on May 21, 1997 while the plaintiff was incarcerated at the Standish Maximum Correctional Facility ("SMF"). The plaintiff alleges that the defendant, a corrections officer at SMF, intentionally provoked the plaintiff and wrote a violation accusing the

plaintiff of Threatening Behavior, a serious offense. Specifically, the plaintiff claims that he noticed the defendant staring at him through a dining room window, and that the plaintiff stared back. In response, the defendant allegedly stormed into the dining room, and the plaintiff then rose from his seat and approached the defendant. The plaintiff was then handcuffed and led away to a detention cell.

The defendant subsequently initiated disciplinary proceedings against the plaintiff, charging him with Threatening Behavior, defined as threatening words or behavior expressing an intent to injure another. *See* MDOC P.D. 03.03.105, Pl.'s S.J. Ex. 2 at 2. Six days after the incident, a disciplinary hearing was held and the plaintiff was found not guilty of Threatening Behavior, but found guilty of the lesser charge of Insolence, defined as words, actions or other behavior intended to harass or cause alarm to an employee. *See id.* at 3. The plaintiff was punished with seven days detention and thirty days' loss of privileges.

The plaintiff alleges that the provocation and write-up was in retaliation for two prior lawsuits filed by the plaintiff against the defendant. The plaintiff first filed suit against defendant Close in 1994; Close was granted summary judgment in 1995. The second suit was filed in February, 1996 and dismissed in December, 1996.

The defendant now contends that he is entitled to summary judgment because the plaintiff has failed to come forward with sufficient evidence to support his allegations that he was subjected to adverse action and that the action taken against him, even if adverse, was in retaliation for the prior suits.

II.

In the Sixth Circuit, a prisoner alleging retaliation for engaging in an activity protected by the First Amendment must establish three elements: the plaintiff's engagement in protected conduct,

adverse action taken against the plaintiff that would deter a person of ordinary firmness from engaging in protected conduct, and proof that the adverse action was motivated at least in part by the plaintiff's engagement in the protected activity. *See Thaddeus-X v. Blatter*, 175 F.3d 378, 386 (6th Cir. 1999) (en banc). The first element is not disputed here; even though incarcerated, the plaintiff retains the right of access to the courts. *See Bounds v. Smith*, 430 U.S. 817, 821-24 (1977). The defendant instead challenges the plaintiff's showing on the second and third elements of his retaliation claim. The Magistrate Judge found that the defendant's showing on the second element was so one-sided that summary judgment was appropriate. However, the defendant's arguments against the third element are much stronger, and dispositive of this case.

When the plaintiff has the burden of proof on a claim, the defendant may support a motion for summary judgment when he demonstrates that the plaintiff lacks sufficient evidence on any element of that claim. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989). Once the defendant has made such a showing, the plaintiff may not rely solely on his pleadings, but must offer affirmative evidence from which a reasonable fact finder could find in his favor. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). The plaintiff's showing must be more than an assertion that the trier of fact could disbelieve the defendant's proffered evidence. *Street*, 886 F.2d at 1479. Even when the plaintiff does offer affirmative evidence, however, the Court must view all reasonable inferences arising from that evidence in the light most favorable to the plaintiff. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). As a result, although the plausibility of circumstantial evidence may be considered, any direct evidence offered by the plaintiff in response to a summary judgment motion must be accepted as true. *Adams v. Metiva*, 31 F.3d 375, 382 (6th Cir. 1994). However, when the evidence is so one-sided that no reasonable jury could find

for the non-moving party, summary judgment as a matter of law should be granted. *Anderson*, 477 U.S. at 251-52.

On the third element of the plaintiff's retaliation claim, causation, the defendant has demonstrated a lack of affirmative evidence for the plaintiff's claim. Specifically, the defendant points out that the incident at issue in this case occurred two and a half years after the first suit was filed and one and a half years (actually about fifteen months) after the second. The defendant correctly notes that the temporal connection between these lawsuits and the incident in question is remote. In response to the defendant's motion, the plaintiff pointed to his prior litigation with the defendant, and further stated that there has been a "constant problem between me and him from 1994, from the time he chose to involve hisself [sic] with my litigation with other officers." Pl.'s Dep., dkt. 75, Ex. 1. In this Circuit, however, temporal proximity by itself is generally insufficient to establish causation for a retaliation claim. *See Smith v. Campbell*, 250 F.3d 1032, 1038 (6th Cir. 2000); *Nguyen v. City of Cleveland*, 229 F.3d 559, 566 (6th Cir. 2000). In the absence of additional probative evidence, the Sixth Circuit has specifically found that a delay of even five months is too long. *See, e.g., Hafford v. Seidner*, 183 F.3d 506, 518 (6th Cir. 1999) (two to five month delay is too long); *Cooper v. City of North Olmsted*, 795 F.2d 1265, 1272 (6th Cir. 1986) (four months too long). The time gap in this case is fifteen months, which is clearly outside the parameters established by the Sixth Circuit. Furthermore, the plaintiff's generalized assertion of animosity between himself and the defendant is plainly insufficient. Under the plaintiff's reasoning, he would be able to proceed with a retaliation claim anytime this defendant took adverse action against him. This result would create unreasonable disorder in the prison context, where officer-inmate animosity and civil rights lawsuits have evolved into a ritualistic form of social intercourse.

Thus, the Magistrate Judge's finding that the plaintiff had not sustained his burden of proof

on this element was correct. In his objections to this finding, the plaintiff contends that temporal proximity is sufficient to establish this element, the clearly established precedential law of this Circuit to the contrary notwithstanding. He also claims that the case for causation is strengthened by his absence from SMF for much of the time between the filing of his second lawsuit and the incident in question, and his assertion that the incident was the first time in several months that the defendant and the plaintiff had any personal contact. Pl.'s Obj. at 13-14. The plaintiff also attached his log of the events he deems significant occurring between 1996 and the incident in this case. *Id.* Ex. H, at 1-4. Even if these notes were admissible, there is still no direct evidence of animosity, such as statements made by the defendant, that the Court would be required to take as true. *See Adams*, 13 F.3d at 382. Further, the conclusion is inescapable that no reasonable fact finder would draw an inference of causation from these items. The plaintiff essentially asks this Court to trust his hunch that the defendant's adverse action against him was motivated by his past lawsuits. Given the clear precedent in this Circuit, however, that speculation and hunches are insufficient to defeat a summary judgment motion, the Court declines the plaintiff's invitation. *See Hartsel v. Keys*, 87 F.3d 795, 802 (6th Cir. 1996).

III.

Although, as noted in the rulings on the defendant's first two motions for summary judgment, the plaintiff's complaint properly pleads all the elements of a retaliation claim, the plaintiff has not been able to deliver factual support. The law is clear that the plaintiff may not rely on his pleadings alone. The plaintiff's prior history of litigation with the defendant is the only circumstantial support for his theory of retaliation. However, this Court is bound by Circuit precedent that rejects the sufficiency of such evidence standing alone. The Magistrate Judge's Report and Recommendation is thus correct, and the defendant's motion for summary judgment will be granted.

Accordingly, it is **ORDERED** that the Magistrate Judge's Report and Recommendation is **ADOPTED**.

It is **FURTHER ORDERED** that the defendant's Motion for Summary Judgment [dkt #73] is **GRANTED**.

DAVID M. LAWSON

DAVID M. LAWSON
United States District Judge

Dated: December 17, 2001

Copies to:
Shakur Muhammad – #213302, 1576 Bluewater Highway, Ionia, MI 48846
Wendy Davis Kanar, Esq.
Kevin Himebaugh, Esq.
Honorable Charles E. Binder, United States Magistrate Judge

CORRECTIONS DIVISION

AUG 16 2001

ASSIGNED TO:

FILED
Aug 15 3 39 PM '01
US DISTRICT COURT
EASTERN DISTRICT
BAY CITY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

R. 78

SHAKUR MUHAMMAD,
aka John E. Mease,

Plaintiff,

v.

MARK CLOSE,

Defendant.
_____/

CIVIL ACTION
NO. 98-CV-10153-BC

DISTRICT JUDGE DAVID M. LAWSON
MAGISTRATE JUDGE CHARLES BINDER

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION ON DEFENDANT CLOSE'S RULE 56(b) MOTION FOR SUMMARY JUDGMENT
(Dkt. 73)

I. RECOMMENDATION

For the reasons set forth below, **IT IS RECOMMENDED** that Defendant's motion for summary judgment be **GRANTED.**

II. REPORT

A. INTRODUCTION and FACTS

Pending, pursuant to a general case management Order of Reference from United States District Judge Robert Cleland,[1] (Dkt. 6), is Defendant Close's motion for summary judgment. Plaintiff filed a response brief (Dkt. 75) and Defendant filed a reply (Dkt. 76). Upon review of the pleadings, I conclude that pursuant to E.D. Mich. LR 7.1(e)(2), this motion is ready for Report and Recommendation without oral argument.

Plaintiff filed this prisoner civil rights complaint under 42 U.S.C. § 1983, claiming that "Defendant framed Plaintiff in retaliation for the Plaintiff's exercise of his First Amendment rights." (Compl., Dkt. 3 at 4B.) The incident in question occurred on May 21, 1997, while Plaintiff was incarcerated in general population at Standish Maximum Facility ("SMF"). Plaintiff alleges that Defendant Close, a corrections officer employed by SMF, instigated an incident with Plaintiff, and then filed an inflated misconduct charge against him, all with the intent of retaliating against Plaintiff for filing two previous civil rights lawsuits against Defendant Close and others, as well as for filing SMF grievances against Defendant.

Specifically, Plaintiff alleges that while he was eating breakfast in the dining area, he noticed Defendant Close staring at him. Plaintiff continued to eat, but when he looked up again, Defendant was still staring. At this time, Plaintiff began to stare back. Plaintiff alleges that Defendant then "made a fighting stance" towards him. (Compl., Dkt. 3 at 4A.) Plaintiff turned away to drink his coffee, and then noticed that Defendant was "coming into the dining area at a fast pace with his face contorted." (*Id.*) Plaintiff, feeling threatened by Defendant's body language and fast approach, stood up and walked towards the Defendant. Plaintiff alleges that when "Defendant and Plaintiff came within a foot of one another, Defendant stated, 'What's up,' while staring angerly [sic] at Plaintiff. Plaintiff

[1]Pursuant to Administrative Order 00-AO-045, issued August 22, 2000, United States District Judge David M. Lawson assumed responsibility for the Bay City docket effective September 5, 2000.

did not respond." Plaintiff was then handcuffed by two other officers and taken to a detention cell. (*Id.*)

Following this incident, Defendant Close filed a Major Misconduct Report charging Plaintiff with the major rule violation of "Threatening Behavior."[2] Six days after the incident, a Major Misconduct Hearing was held and Plaintiff was found not guilty of Threatening Behavior. (*Id.* at 1.) After reading witness statements from both inmates and officers, the hearing officer reduced the charge to Insolence.[3] Plaintiff was found guilty of Insolence. Plaintiff was given the disciplinary sanctions of seven days' detention and thirty days' loss of privileges for the violation. (*Id.*)

B. PROCEDURAL HISTORY

Plaintiff filed this action on June 2, 1998. The complaint alleges, first, that Defendant instigated the confrontation to provoke Plaintiff, and second, that when that plan was successful, Defendant then wrote Plaintiff up for a more severe misconduct violation, (one that required mandatory immediate detention), than was warranted by Plaintiff's

[2]"Threatening Behavior" is a major rule violation defined as: "Words, actions or other behavior which expresses an intent to injure or physically abuse another person. Such misconduct includes attempted assault and battery." MDOC P.D. 03.03.105, Attachment B at 2. It is a "[m]andatory 'nonbondable' charge." *Id.* at 1. The Policy Directive lists the following as common examples of Threatening Behavior: "Threats of sexual assault made by one prisoner to another prisoner; writing threatening letters to another person; threats made to a third person which are intended to place the person threatened in fear of harm." *Id.* at 2.

[3]"Insolence" is also classified as a major rule violation. Its definition is: "Words, actions, or other behavior which is intended to harass, or cause alarm in an employee." *Id.* at 3. It is not, however, a mandatory nonbondable charge. Common examples of Insolence are: "Abusive language, writing or gesture directed at an employee." *Id.*

actions. Plaintiff alleges that both of these acts were purposely taken in an effort to retaliate against him for exercising his constitutional right to file lawsuits.

In July 1998, Defendant Close filed his initial motion for dismissal and/or summary judgment on the following grounds: (1) that *Edwards v. Balisok*, 520 U.S. 641, 117 S. Ct. 1584, 137 L. Ed. 2d 906 (1997), barred Plaintiff's claim; (2) that the finding of guilt on the misconduct charge defeated Plaintiff's claim that the ticket was retaliatory and an abuse of authority; and (3) that Defendant was entitled to qualified immunity. (Dkt. 9.) This Court recommended denial of the motion in a Report and Recommendation ("R&R") dated November 24, 1998. The R&R suggested that, when construing the allegations found in the complaint as true and viewing them in the light most favorable to Plaintiff, there were three issues of material fact in dispute: (1) whether Defendant intentionally committed the act of instigating a confrontation with Plaintiff; (2) whether Defendant intentionally charged Plaintiff with a more severe prison violation than was warranted; and (3) whether he did these alleged acts with the motivation to retaliate against Plaintiff for exercising his First Amendment rights. Judge Cleland adopted the Report and Recommendation on March 26, 1999, over Defendant's objections. (Dkt. 22.)

Subsequently, Plaintiff was appointed counsel and the parties engaged in discovery. Defendant Close then brought a motion for dismissal on two grounds: (1) that Plaintiff failed to exhaust his administrative remedies as required by the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a); and (2) that Plaintiff failed to allege a physical injury as required by the PLRA, 42 U.S.C. § 1997e(e). On November 2, 2000, this Court

recommended denial of the motion (Dkt. 68), and on January 12, 2001, Judge Lawson adopted the Report and Recommendation over Defendant's objections. (Dkt. 71.)

Defendant Close now brings another motion for summary judgment, asserting that "after discovery, the above three issues [of material fact] have been resolved in Officer Close's favor and that there is no reasonable dispute that necessitates putting these questions before a jury." (Def.'s Mot., Dkt. 73 at 3.)

C. ANALYSIS AND CONCLUSIONS

1. Motion Standards

A motion for summary judgment will be granted under Rule 56(c) of the Federal Rules of Civil Procedure where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. All facts and inferences must be viewed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact as to an essential element of the non-movant's case. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). In determining whether the moving party has met its considerable burden, a court may consider the plausibility of the moving party's evidence. *See Matsushita*, 475 U.S. at 587-88.

To defeat the motion, the non-moving party cannot rest merely on the pleadings alone. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 191 L. Ed. 2d 202 (1986). The non-moving party has an obligation to present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Celotex*, 477 U.S. at 324. After examining the evidence, the court then determines "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1310 (6th Cir. 1989) (quoting *Anderson*, 477 U.S. at 251-52). Summary judgment will not be granted "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

2. Retaliation Claim

a. Governing Law

When the first motion for summary judgment in this case was decided, the standard applicable to claims of retaliation for the exercise of First Amendment rights was not all that clear in the Sixth Circuit. (*See* R&R dated 11/24/98 at 12-17.) In March of 1999, however, the Sixth Circuit clarified the standard to be applied in the case of *Thaddeus-X v. Blatter*, 175 F.3d 378, 386 (6th Cir. 1999) (en banc). The *Thaddeus-X* standard is now applicable to this case. *See Herron v. Harrison*, 203 F.3d 410, 414 (6th Cir. 2000) (reversing district court's dismissal of prisoner's First Amendment retaliation claim because *Thaddeus-X* controlled even though it was decided eight months after district court dismissed the case).

In *Thaddeus-X*, the court confirmed that "government actions, which standing alone do not violate the Constitution, may nonetheless be constitutional torts if motivated in

substantial part by a desire to punish an individual for exercise of a constitutional right." *Thaddeus-X*, 175 F.3d at 386. The court clarified that there are three elements to a claim of retaliation based on the exercise of a specific constitutional right:

> (1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two – that is, the adverse action was motivated at least in part by the plaintiff's protected conduct.

Id. at 394.

The first element requires that the plaintiff show that he engaged in conduct protected by law. The court explained that when a retaliation claim is brought by a prisoner, this element must take into consideration the plaintiff's incarcerated status:

> [I]t is generally much harder for a prisoner to show that his conduct is protected because prison regulations are allowed to infringe on prisoners' rights as long as they are rationally related to a legitimate penological concern. *See Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). Therefore, if a prisoner violates a legitimate prison regulation, he is not engaged in "protected conduct," and cannot proceed beyond step one.

Thaddeus-X, 175 F.3d at 395.

The term "adverse action" in the second element is derived from retaliation cases arising in the public employment context. In those cases, adverse action could include discharge, refusal to hire, or failure to promote. *Id.* at 396. In the prison context, the court explained,

> an action comparable to transfer to administrative segregation would certainly be adverse. In order to determine whether actions of lesser severity merit being deemed "adverse" for purposes of a retaliation claim, we adopt the standard suggested by Judge Posner in *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982), that an adverse action is one that would "deter a person of ordinary firmness" from the exercise of the right at stake.

Thaddeus-X, 175 F.3d at 396.

The third element -- a causal connection between the protected conduct and the adverse action -- begins with the plaintiff bearing the "burden of establishing that his protected conduct was a motivating factor behind any harm." *Id.* at 399.

b. First Element – Protected Conduct

In this case, Defendant Close does not dispute that Plaintiff has met the first element of a retaliation claim. Plaintiff claims that he was retaliated against because he named Defendant Close as a defendant in two prior lawsuits. It is well established that prisoners have a constitutional right of access to the courts, *see Bounds v. Smith*, 430 U.S. 817, 821-24, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977), and therefore Plaintiff has alleged that he engaged in protected conduct.

c. Second Element – Adverse Action

Plaintiff claims that the adverse action taken against him consisted of Defendant Close provoking him by coming into the dining area with a contorted look on his face after staring and making a "fighting stance" outside the window, and then, when Plaintiff reacted, Defendant "purposely overcharg[ing] Plaintiff with a nonbondable offense in order to ensure that he received toplock prior to his hearing." (Pl.'s Resp., Dkt. 75 at 8.) Defendant Close asserts and this Court agrees that both issues – whether he instigated the confrontation and whether he inflated the misconduct charge – relate to the second prong of the *Thaddeus-X* standard. (Def.'s Mot., Dkt. 73 at 3.) As a threshold matter, I suggest

that these acts as alleged would rise to the level of "adverse action" contemplated by the *Thaddeus-X* standard because being wrongfully charged with a non-bondable major misconduct violation and therefore placed in toplock could deter a person of ordinary firmness from continuing to engage in protected conduct. *See Thaddeus-X*, 175 F.3d at 396 ("an action comparable to transfer to administrative segregation would certainly be adverse."). However, the question presented by a summary judgment motion following discovery is not whether Plaintiff has stated a claim, but "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Booker*, 879 F.2d at 1310.

Defendant contends that, although Plaintiff's allegations are sufficient to survive a dismissal motion, he is entitled to summary judgment because discovery has not uncovered any evidence that he provoked Plaintiff by making a "fighting stance" as Plaintiff claimed in his complaint. Defendant states: "Before discovery, it was not clear whether Officer Close instigated the confrontation with Muhammad. Based on the deposition testimony, however, there is no longer any reasonable dispute over this issue." (*Id.*)

Defendant points to the deposition testimony of Corrections Officer Richard Metevia, Resident Unit Manager Darlene McIntire, and of Plaintiff himself in support of this position, drawing attention to the fact that the testimony is consistent with Defendant's contention that he did not make a "fighting stance," but rather that he thought Plaintiff was trying to say something to him through the glass so he simply made a "what do you want" gesture by raising his palms up. Officer Metevia was standing next to Defendant Close

at the glass while they were looking into the dining area, and described the gesture made by Defendant:

> Q . . . Did you observe Mark Close making any motions towards the prisoner before he went into the chow area?
>
> A Seemed like Mease said something and Close went, I can't hear you, whatever, you know, through the glass between them.
>
> Q Now, I just realized we made a gesture, and the court reporter can't record that. Could you describe the gesture in words?
>
> A Like palms up, "what did you say," you know.
>
> Q So you lifted your lower arms up, and leaving the upper arms at your sides, you've lifted your lower arms up, palms up?
>
> A Yeah.

(Metevia Dep., Dkt. 73, Ex. 3 at 19-20.) Officer Metevia also testified that from his observations, it did not appear that Defendant Close instigated a confrontation with Plaintiff. (*Id.* at 21.) Similarly, Resident Unit Officer Darlene McIntire, who was on duty in the dining area at the time of the incident, testified at her deposition that she witnessed Defendant Close come into the "chow hall" and stop, and "then Mease just walked in further and further, came right up into his face." (McIntire Dep., Dkt. 73 at Ex. 7.)

Defendant also contends that Plaintiff's own deposition testimony is consistent with Defendant's version of what happened:

> A . . . He made this gesture towards me like this (indicating).
>
> Q Okay. So this gesture is his hands are sort of straight out in front about –
>
> A Like this (indicating).

Q About, what is that, two and a half, three feet apart. So were his palms up?

A Yes.

(Muhammad Dep., Dkt. 73, Ex. 6 at 11-12.)

When responding to a motion for summary judgment, the non-moving party cannot rest merely on the pleadings alone, *Anderson*, 477 U.S. at 248, but has an obligation to present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Celotex*, 477 U.S. at 324. In this case, Plaintiff has not presented any affirmative evidence in response to Defendant's motion other than cites to his own deposition testimony where he reiterates his allegation that Defendant instigated the confrontation by making an aggressive gesture similar to a "wrestling position." (Pl.'s Resp., Dkt. 75 at 5.) Instead, Plaintiff merely discounts the testimony of officers Metevia and McIntire, pointing out that they are co-workers of Defendant Close and employees of the MDOC, the entity that would have to pay any judgment if Plaintiff prevails. Plaintiff argues that "[a] jury may well discount such testimony as self-serving and biased." (*Id.*)

When analyzing this issue in the first R&R at the pre-discovery stage, the Court of course acted on the presumption that Plaintiff would uncover evidence during discovery, such as eyewitness testimony, that would support his allegations. Now, however, the Court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Booker*, 879 F.2d at 1310. On this issue of whether Defendant Close instigated

the incident by making a "fighting stance," I suggest that the evidence proffered is, under this standard, entirely one-sided – favoring the Defendant.

Defendant Close similarly claims that he is entitled to summary judgment on the issue of whether he "overcharged" Plaintiff with the misconduct violation of Threatening Behavior. Defendant points to the deposition testimony of three witnesses in support of his argument that Threatening Behavior was an appropriate charge in light of Plaintiff's conduct. First, Sergeant Walter Tipton, who also witnessed the incident, was asked whether he perceived Plaintiff's conduct as threatening, and he responded: "Looked like he might was going to hit him or something was going to happen, that was obvious. If it was me personally, yeah, I may have felt threatened, if it was me personally." (Tipton Dep., Dkt. 73, Ex. 4 at 37.)

Second, Officer Metevia testified that he thought Defendant Close acted properly in writing the ticket. (Metevia Dep., Dkt. 73, Ex. 3 at 22.) Third, Hearing Officer Arvid Perrin, who found Plaintiff not guilty of Threatening Behavior but guilty of the lesser included offense of Insolence, testified that the Threatening Behavior charge was nevertheless not unjustified. He explained that, in his opinion, the fact that Plaintiff had not made an overt move to strike Defendant Close led him to the conclusion that the standard for Threatening Behavior had not been met, however, another hearing officer could have reached a different result:

Q Now, just based on the facts of this [case], is this something where a different Hearing Officer could have reached a different decision [than] you?

A More than likely, it could have been, yes. I'm sure that some Hearing Officers would have felt that this was threatening behavior. . . .

(Perrin Dep., Dkt. 73 at Ex. 5.)

Defendant therefore asserts, supported by the testimony presented, that he "had good reason, based on the intensity of the confrontation, for writing the Threatening Behavior ticket." (Def.'s Mot., Dkt. 73 at 9.)

In response to this issue, Plaintiff again has presented no directly relevant affirmative evidence, but once more points out that the witnesses relied upon by Defendant are MDOC employees who have an interest in the matter. Plaintiff does provide the Court with a statistical report prepared by the MDOC showing major misconduct hearing statistics for all MDOC hearing officers, including the percentage of misconduct hearings where the charges were upheld, reduced, or dismissed. Plaintiff argues that Hearing Officer Perrin's testimony that another hearing officer may have found Plaintiff guilty of Threatening Behavior could be found by a jury to be "incredible" in light of the fact that the MDOC keeps such statistics and evaluates the performance of its hearing officers based upon the number of charges they uphold. (Pl.'s Resp., Dkt. 75 at 8-9.)

Once again I suggest that Plaintiff has failed to meet his burden of responding to the summary judgment motion with affirmative evidence of a sufficient disagreement to require submission to a jury. Obviously, Plaintiff does not have the burden of persuading this Court at the summary judgment stage to the same degree it would have to persuade a jury at trial. However, Plaintiff has failed to present any evidence other than Plaintiff's own allegations. His argument regarding the MDOC's performance evaluation methods

may be engaging and potentially admissible rebuttal at trial to testimony of Hearing Officer Perrin, but it is not evidence that Defendant Close's decision to charge Plaintiff with Threatening Behavior was an unreasonable overcharge in light of the facts.

d. Third Element – Causal Connection

The third element of a retaliation claim involves a defendant's subjective intent. *See Thaddeus-X*, 175 F.3d at 399. Plaintiff has the initial burden of showing that his protected conduct, which in this case was filing two previous lawsuits naming Close as a defendant, was a substantial or motivating factor behind the adverse action. *See Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977). Although a court may not require that a plaintiff prove motive by clear and convincing evidence at the summary judgment stage, *see Crawford-El v. Britton*, 523 U.S. 574, 118 S. Ct. 1584, 1595, 140 L. Ed. 2d 759 (1998), a plaintiff nonetheless must provide more than conclusory allegations of retaliatory motive to survive summary judgment. *See Smith v. Campbell*, 250 F.3d 1032, 1038 (6th Cir. 2000).

Plaintiff here states that "it is undisputed that Plaintiff was pursuing litigation against Defendant at the time of the incident in question. The jury is then left with the subjective credibility question of whether Defendant acted as he did because of those suits." (Pl.'s Resp., Dkt. 75 at 9.) Plaintiff has not, however, alleged that Defendant Close ever made any statements that he harbored bad feelings toward Plaintiff because of these prior lawsuits or that he intended to punish Plaintiff for filing them. Rather,

Plaintiff's argument is solely that the temporal proximity between the prior lawsuits and the dining room incident demonstrates a causal connection.

Defendant Close conversely claims that the timing of the prior lawsuits supports his position that he in no way was motivated to charge Plaintiff with misconduct because he wanted to retaliate for the prior suits. Defendant has provided copies of court dockets to show that the first lawsuit naming him as a defendant was filed by Plaintiff in December 1994, and summary judgment was granted to defendants in August 1995. The second suit was filed in February 1996 and was dismissed in December 1996. (Def.'s Mot., Dkt. 73 at 12, Exs. 8 & 9.) The alleged incident of retaliation which gave rise to this lawsuit occurred in May of 1997, two and a half years after the first suit was filed and one and a half years after the second. Defendant asserts that the intervals between the prior suits and this incident preclude any inference that the prior suits were a motivating factor behind his charging Plaintiff with misconduct. Furthermore, Defendant states that "[a]lthough Muhammad appealed these decisions [in the prior suits], there is nothing in the record showing that Officer Close was aware of Muhammad's appeals." (*Id.* at 12.) Defendant therefore asserts that Plaintiff has failed to establish a causal connection.

In his response to Defendant's summary judgment motion on this issue, Plaintiff has not presented any affirmative evidence other than the Plaintiff's own deposition testimony where he stated that there has been a "constant problem between me and him from 1994, from the time he chose to involve hisself [sic] with my litigation with other officers." (Pl.'s Dep., Dkt. 75 at Ex. 1.)

In *Smith v. Campbell*, 250 F.3d 1032 (6th Cir. 2001), the plaintiff claimed that he was transferred in retaliation for the grievances he filed against prison officials. With regard to the third element of the *Thaddeus-X* standard, the only valid connection plaintiff put forth concerning retaliatory motive was the fact that he was transferred only days after he informed his counselor that he was gathering documentation to file a grievance and a lawsuit.[4] *Id.* at 1038. The Sixth Circuit affirmed the district court's grant of summary judgment for defendants, stating:

> Aside from [the counselor's] statements, the temporal proximity between Smith filing his grievances and the decision to transfer him provides some circumstantial support for a causal connection. However, the Court concludes that this evidence alone is not sufficient to meet Smith's burden to show that the filing of grievances was a substantial or motivating factor for his transfer.

Id.

I suggest that in this case, as in *Smith*, the temporal proximity connection alone is insufficient to survive a motion for summary judgment. First, in this case the time frame between the protected conduct and the alleged retaliatory act is not a matter of days, but of years. It is entirely plausible that Defendant Close had no idea that Plaintiff had filed appeals of the prior lawsuits, and Plaintiff has not refuted that claim. *See Matsushita*, 475 U.S. at 587-88 (stating that in determining whether the moving party has met its considerable burden, a court may consider the plausibility of the moving party's evidence).

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[4]The plaintiff also claimed that his counselor's alleged statement that the prison could transfer him at any time and say it was based on institutional needs supported the inference of retaliatory motive, but the Sixth Circuit rejected that notion because the counselor was not the decisionmaker with regard to the transfer. *Id.* at 1038.

Moreover, like in *Smith*, the temporal proximity claim is the sole support for Plaintiff's claim that Defendant Close acted with retaliatory animus, as apparently no statements from Defendant or others were adduced in discovery which could serve as evidence to put before a jury to satisfy this element.

e. Conclusion

I therefore suggest that, faced now with the Defendant's well-supported motion for summary judgment, Plaintiff has failed to come forward with evidence on which a jury could reasonably find that Defendant Close retaliated against Plaintiff because of his prior lawsuits. Although Plaintiff has met one element of a retaliation claim, and his *pro bono* counsel has vigorously advocated Plaintiff's position, the evidence on the other two elements is so one-sided that one party must prevail as a matter of law. *Anderson*, 477 U.S. at 251-52. Accordingly, I suggest that Defendant's motion for summary judgment be granted.

Because I have suggested that Plaintiff has failed to present sufficient evidence to survive summary judgment, the alternate grounds for summary judgment presented in Defendant's motion shall not be addressed.

III. REVIEW

The parties to this action may object to and seek review of this Report and Recommendation within ten (10) days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1). Failure to file specific objections constitutes a waiver of any further

right of appeal. *See Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); *Howard v. Sec'y of Health & Human Servs.*, 932 F.2d 505 (6th Cir. 1991); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). The parties are advised that making some objections, but failing to raise others, will not preserve all the objections a party may have to this Report and Recommendation. *See Willis v. Sec'y of Health & Human Servs.*, 931 F.2d 390, 401 (6th Cir. 1991); *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

CHARLES E. BINDER
United States Magistrate Judge

DATED: August 15, 2001

Copies to: Ms. Wendy Davis Kanar, Attorney at Law, 414 Townsend St., P. O. Box 632, Midland, MI 48640
Mr. Kevin Himebaugh, Assistant Attorney General, Corrections Division, P. O. Box 30217, Lansing, MI 48909
Honorable David M. Lawson, United States District Judge